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No. 01-1311

Supreme Court U.S.
FILED
APR 8 2002
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In the

Supreme Court of the United States

MILWAUKEE SAFEGUARD INSURANCE COMPANY, et al.,

Petitioners,

v.

STEPHEN F. SELCKE, Director of the Illinois Department of Insurance, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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38pp

QUESTION PRESENTED

Does the Fourteenth Amendment's Due Process clause preclude a State from applying a clearly established State law that requires a party seeking a tax refund to prove that it bore the economic burden of the tax in order to prevent the party from being unjustly enriched?

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JURISDICTION

Although Petitioners purport to invoke this Court's jurisdiction under 28 U.S.C. § 1257, the decision that is the subject of the Petition is a nonfinal order issued by the Illinois Appellate Court answering four questions of law certified by the trial court under Illinois Supreme Court Rule 308. As explained in greater detail in the Reasons For Denying The Petition, this interlocutory order is not within this Court's jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

The following are the Illinois statutes and the Illinois Constitutional provisions involved in this Brief in Opposition:

1) The Annual Privilege Tax Payable by Foreign or Alien Companies, 215 ILCS 5/409 (1997), in relevant part, provided:

> Annual privilege tax payable by foreign or alien companies. (1) Every foreign or alien company doing an insurance business in this State, except fraternal benefit societies, shall, for the privilege of doing business in this State by renewal of certificate of authority as provided in Section 114, pay to the Director for the State treasury a State tax equal to 2 per cent of the net taxable premium income, together with any amounts due under Section 444. Every domestic insurance company, except a fraternal benefit society, which fails to comply with all the requirements of subsection (4) of the Section must pay to the Director for payment into the State Treasury a State tax equal to 2 per cent of the net taxable premium income and upon the failure of any company to pay any such tax due, the Director may, by order, revoke the company's certificate of auth-

ority after giving 20 days written notice to the company. The gross taxable premium income shall be the gross amount of premiums received on direct business during the preceding calendar year on contracts covering risks in this State, except premiums on annuities and except premiums on group insurance contracts awarded after the effective date of the amendatory Act of 1976 under the State Employees Group Insurance Act of 1971, and except premiums for deferred compensation plans for employees of the State, units of local government or school districts.

2) The Illinois Retaliatory Tax, 215 ILCS 5/444, in relevant part, provides:

Whenever the existing or future laws of any other state or country shall require of companies incorporated or organized under the laws of this State as a condition precedent to their doing business in such other state or country, compliance with laws, rules, regulations, and prohibitions more onerous or burdensome than the rules and regulations imposed by this State on foreign or alien companies, or shall require any deposit of securities or other obligations in such state or country, for the protection of policyholders or otherwise or require of such companies or agents thereof or brokers the payment of penalties, fees, charges, or taxes greater than the penalties, fees, charges, or taxes required in the aggregate for like purposes by this Code or any other law of this State, of foreign or alien companies, agents thereof or brokers, then such laws, rules, regulations, and prohibitions of said other state or country shall apply to companies incorporated or organized under the laws of such state or country doing business in this State, and all such companies, agents thereof, or brokers doing business in this State, shall be required to make deposits, pay penalties, fees, charges, and taxes, in amounts equal to those required in the aggre-

gate for like purposes of Illinois companies doing business in such state or country, agents thereof or brokers. Whenever any other state or country shall refuse to permit any insurance company incorporated or organized under the laws of this State to transact business according to its usual plan in such other state or country, the director may, if satisfied that such company of this State is solvent, properly managed, and can operate legally under the laws of such other state or country, forthwith suspend or cancel the license of every insurance company doing business in this State which is incorporated or organized under the laws of such other state or country to the extent that it insures in this State against any of the risks or hazards which are sought to be insured against by the company of this State in such other state or country.

3) The State Officers and Employees Money Disposition Act (the "Protest Act"), 30 ILCS 230/2a, in relevant part, provides:

Every officer, board, commission, commissioner, department, institute, arm, or agency to whom or to which this Act applies is to notify the State Treasurer as to money paid to him, her, or it under protest as provided in Section 2a.1, and the Treasurer is to place the money in a special fund to be known as the protest fund. At the expiration of 30 days from the date of payment, the money is to be transferred from the protest fund to the appropriate fund in which it would have been placed had there been payment without protest unless the party making the payment under protest has filed a complaint and secured within that 30 days a temporary restraining order or a preliminary injunction, restraining the making of that transfer and unless, in addition, within that 30 days, a copy of the temporary restraining order or preliminary injunction has been served upon the State Treasurer and also upon the officer,

board, commission, commissioner, department, institute, arm, or agency to whom or to which the payment under protest was made, in which case the payment and such other payments as are subsequently made under notice of protest, as provided in Section 2a.1, by the same person, the transfer of which payments is restrained by such temporary restraining order or preliminary injunction, are to be held in the protest fund until the final order or judgment of the court.

4) The Illinois Constitution's Uniformity Clause, Ill. Const. Art. 9, § 2, in relevant part, provides:

In any law classifying the subjects or objects or nonproperty taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly.

STATEMENT OF THE CASE

The Petitioners are insurance companies organized in States other than Illinois that protested their Illinois Privilege Tax payments between 1993 and 1997. 215 ILCS 5/409. During this time, Respondents enforced this presumptively valid tax.

The Illinois Supreme Court held that the Privilege Tax violated the Uniformity Clause of the Illinois Constitution. *Milwaukee Safeguard Insurance Co. v. Selcke*, 179 Ill. 2d 94, 688 N.E.2d 68 (1997). The Illinois Supreme Court did not address the Federal or State Equal Protection grounds argued for invalidating that tax, and remanded the case back to trial court. *Id.* at 104-05, 688 N.E.2d at 73. After that ruling, Illinois amended its Privilege Tax such that domestic and foreign insurers are taxed on the same basis. 215 ILCS 5/409.

On remand, the State argued that the Petitioners were not entitled to any refunds because they were separately

liable for a Retaliatory Tax under 215 ILCS 5/444. Under Illinois' Retaliatory Tax, out-of-state insurers are required to pay the same fees, taxes, and assessments in Illinois, as their home States impose on Illinois insurers doing business in those States. *Id.*; *see generally Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 674 (1981) (upholding California's retaliatory tax, which is analogous to the Illinois Retaliatory Tax). The trial court initially ruled that applying the retaliatory tax here is inconsistent with *Western & Southern*. But the State has moved for reconsideration, and that motion has yet to be decided. The Petitioners admit that this issue is still pending in the trial court and may, in fact, negate the Federal issue raised in this Petition. (Petition at p. 6, fn.3) Applying the Retaliatory Tax will eliminate the refund claims of all Petitioners from States with taxes equal to or higher than Illinois' taxes. On the other hand, if the trial court rules that Retaliatory Tax is unconstitutional, the State is entitled to immediate appellate review of that ruling by the Illinois Supreme Court. *See* Ill.S.Ct.R. 302(a). Accordingly, there are still State substantive issues that remain to be adjudicated in the trial court and that will be subject to appellate review thereafter.

On remand, the State also argued that Illinois' long-established rule against windfall tax refunds required that Petitioners prove that they bore the economic burden of the disputed tax, rather than passing it on to their Illinois policyholders. *See Consolidated Distilling Prod. v. Mahin*, 56 Ill. 2d 110, 119, 306 N.E.2d 465, 469 (1973). Petitioners argued that applying this rule to them violated Due Process as outlined by this Court in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Department of Business Regulation*, 496 U.S. 18 (1990). The trial court rejected Petitioners' argument, but certified that issue for an immediate interlocutory appeal under Illinois Supreme Court Rule 308.

In a thorough and well-reasoned opinion, the Illinois Appellate Court, First District, unanimously held that applying Illinois long-standing rule against windfall tax refunds to Petitioners did not violate Due Process. *Milwaukee Safeguard Ins. Co. v. Selcke*, 324 Ill. App. 3d 344, 353, 754 N.E. 2d 349, 348 (1st Dist. 2001). In reaching this decision, the Court analyzed the Supreme Court's trilogy of cases on refunds of discriminatory taxes, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), *McKesson*, and *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991). As the Appellate Court put it:

> In our view, the United States Supreme Court did not preclude the use of the pass-on defense in a discriminatory tax case. *McKesson* is distinguishable from the instant case. Unlike the defendant in *McKesson*, defendants here have cited an Illinois Supreme Court case that supports the use of a nonstatutory pass-on defense in a discriminatory tax case.

(App. 13)

The Illinois Appellate Court denied the Petitioners' motion to reconsider and their application for a certificate of importance under Illinois Supreme Court Rule 316. (App. 19; App. 21)[1] Thereafter, the Illinois Supreme Court denied the Petitioners' petition for leave to appeal the interlocutory ruling, their petition for a supervisory order, and their motion to stay the mandate pending the Petition for writ of certiorari to this Court. (Supp. App. 3; App. 67)

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[1] Illinois Supreme Court Rule 316 provides the Illinois Appellate Court with authority to require the Illinois Supreme Court to take an appeal in certain circumstances: "Appeals from the Appellate Court shall lie to the Supreme Court upon certification by the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court." Ill.S.Ct.R. 316.

REASONS THE PETITION SHOULD BE DENIED

The Petition should be denied for three reasons:

- The Court does not have jurisdiction to hear the Petition under 28 U.S.C. § 1257. The order that is the subject of the Petition was rendered by the Illinois Appellate Court in an interlocutory appeal answering certified questions of law. It is still subject to further review after a final judgment has been entered. There are other issues and claims pending in the trial court that may obviate the need for review of the Federal issues on appeal. None of the exceptions to finality outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975), apply.

- The decision of the Illinois Appellate Court upholding enforcement of Illinois' long-established rule prohibiting windfall tax refunds by requiring that Petitioners establish that they bore the economic burden of the tax is consistent with the decisions throughout the country. Thus, there is no decisional conflict warranting certiorari.

- The Illinois Appellate Court's decision is correct. It is consistent with this Court's decisions in *Bacchus*, *McKesson*, and *James B. Beam*. None of these cases have interpreted Due Process to require that a claimant be unjustly enriched at a State's expense by refunding a tax that the claimant passed on to its customers or policyholders.

Any one of these reasons alone would be sufficient to deny the Petition. Taken together, there are no "compelling reasons" to grant the Petition for writ of certiorari. U.S. Sup.Ct.R. 10.

I. There Was No Final Judgment Under Section 1257.

This Court lacks jurisdiction over the Petition. While the Supreme Court may exercise certiorari jurisdiction over interlocutory appeals from the Circuit Court of Appeals under 28 U.S.C. § 1254, Congress has restricted the Court's certiorari jurisdiction of State court judgments under 28 U.S.C. § 1257 to "final judgments or decrees."[2] The interlocutory order that is the subject of the Petition is not a "final judgment[ ] or decree[ ] rendered by the highest court of State in which a decision could be had" under Section 1257. 28 U.S.C. § 1257. The Petition is not within any recognized exception to the finality requirement. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975) (recognizing four exceptions to the finality requirement). Instead, Petitioners try to create a new exception to the finality requirement arguing that they will incur high litigation costs if the Petition is denied.

A. The Order Is Not Final.

The order that is the subject of this Petition was rendered by the Illinois Appellate Court, First District, an intermediate State court of appeals, on an interlocutory appeal. Initially, the trial court certified four questions for an in-

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[2] *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice*, 7th ed., p. 195 § 4.18 (1993) ("The Supreme Court has unquestioned jurisdiction to review interlocutory judgments of federal courts of appeals and other federal courts whose judgments are reviewable pursuant to § 1254(1). Invocation of such jurisdiction, unlike the Court's § 1257 jurisdiction over State court judgments, is not conditioned on the finality of the judgment or order in question. But the interlocutory nature of a federal court of appeals judgment is relevant to the Court's discretionary assessment of the appropriateness of immediately reviewing such a judgment.").

terlocutory appeal under Illinois Supreme Court Rule 308, which, like 28 U.S.C. § 1292(b), authorizes discretionary interlocutory appeals under defined narrow circumstances.[3] The Illinois Appellate Court, First District, accepted the certified issues.

After rejecting all of the Petitioners' arguments, including those raised in the Petition to this Court, the Illinois Appellate Court stated, "[T]he trial court's ruling is affirmed and the cause is remanded." (A. 18) The Illinois Supreme Court denied leave to appeal. There is no "final judgment" providing this Court with jurisdiction. The issue was heard on a discretionary interlocutory appeal, and the cause was remanded for further proceedings.

This Court emphatically rejected certiorari review in a nearly identical situation in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), a case not cited by Petitioners. As here, in *Jefferson* an interlocutory appeal had been taken to the Alabama Supreme Court on certified legal issues. The court ruled on those issues and remanded "for further proceedings consistent with [its] opinion." 522 U.S. at 75. Just as here, the ruling in *Jefferson* on the certified issues did not end the litigation. Thus, as the Court explained, Section 1257's finality requirement was not satisfied:

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[3] Illinois Supreme Court Rule 308 provides, "When the trial court . . . finds that the order involves a question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing." Ill.S.Ct.R. 308. Rule 308 has similar wording and fulfills the same purpose as 28 U.S.C. § 1292(b). *See Voss v. Lincoln Mall Management Co.*, 166 Ill. App. 3d 442, 446, 519 N.E.2d 1056, 1059 (1st Dist. 1988). Other States have similar procedural mechanisms. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 80 n.2 (1997) (quoting Alabama Rule of Appellate Procedure 5(a) in holding that interlocutory order was not "final" under Section 1257).

> The Alabama Supreme Court's decision was not a "final judgment." It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioner's complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state law claims.

522 U.S. at 81.

Therefore, under circumstances similar to this case, this Court stated, "[t]his case fits within no exceptional category. It presents the typical situation in which the courts have resolved some but not all of the petitioners' claims." *Id.* at 84.

As in *Jefferson*, the certified questions answered on appeal here did not address the entire case. The application of Illinois' Retaliatory Tax is still pending in the trial court. Applying that tax may negate Petitioners' refund claims. Petitioners concede that issues remain pending in the trial court. (Petition at p. 6, fn.3) Moreover, the decision of the Appellate Court remains subject to further review at the end of the case when a true final judgment is entered. Ill.S.Ct.R. 301 and 318(b).[4]

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[4] Ill.S.Ct.R. 318(b) ("The review of cases at an interlocutory stage is not favored, and a failure to seek review when the Appellate Court's disposition of the case is not final does not constitute waiver of the right to present any issue in the appropriate court thereafter."); *see also Garibaldi v. Applebaum*, 194 Ill. 2d 438, 444, 742 N.E.2d 279, 284 (Ill. 2000) ("Contrary to plaintiff's contention, the law of the case doctrine does not preclude us from reviewing this question, which was resolved by the appellate court in the first appeal but which has not previously been considered on its merits by this court in the course of this litigation.").

B. No Recognized Exception To Finality Applies.

Petitioners do not contend that the order is truly "final." Instead, they address finality with a fleeting reference at the end of the Petition to the fourth finality exception in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975). (Petition at p. 27) Petitioners selectively quote part of *Cox's* description of the fourth exception.[5] They omit two elements of the exception and selectively quote the fourth element.[6]

Cox's fourth exception requires that the Petitioners demonstrate that:

(1) the federal issue has been "finally" decided by the State court;

(2) the party seeking review might prevail on the merits on nonfederal grounds, rendering review of the federal issue unnecessary;

(3) reversal of the State court on the federal issue would be preclusive of any further litigation rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the State proceedings still to come; and

(4) the refusal to conduct an immediate review might seriously erode federal policy.

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[5] Petitioners fail to even mention that the federal issue must be "finally" decided in the State court and that they might prevail on the merits on nonfederal grounds. And in quoting the fourth element, Petitioners omit the temporal language. To satisfy this factor, refusal to conduct ***immediate*** review must seriously erode federal policy.

[6] *See Scott v. Village of Kewaskum*, 786 F.2d 338, 342 (7th Cir. 1986) ("Counsel should not use omissions in an effort to prove a point—it won't work, and it will make the rest of the counsel's presentation incredible.").

The fourth *Cox* exception is rarely found to exist. *See, e.g., Florida v. Thomas*, 532 U.S. 774, 780 (2001). This Court's reluctance to find exceptions to the finality requirement was well stated in *Flynt v. Ohio*, 451 U.S. 619, 622 (1981):

> The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the State courts would qualify for immediate review.

Petitioners cannot meet any of the requirements for the fourth *Cox* exception. First, the Illinois Appellate Court's ruling that Due Process does not preclude windfall or pass-on is still subject to review by the Illinois Supreme Court upon the entry of a final judgment. Ill.S.Ct.R. 301 and 318(b).

Second, Petitioners do not argue that they will prevail on the merits on nonfederal grounds; rather, they only comment in a different context that such an outcome is "theoretically possible." (Petition at p. 19) Indeed, the Petitioners tacitly admit that they passed the Privilege Tax on to their policyholders. Accordingly, Petitioners cannot prevail on the nonfederal grounds.

Third, if this Court were to reverse on the issue presented, there would still be further litigation in the Illinois courts, as Petitioners admit. (Petition at p. 6, fn.3) Regardless of how any court rules on whether the Petitioners can receive a windfall tax refund, there will be further litigation on whether the imposition of Illinois' Retaliatory Tax will prevent refunds to Petitioners. This issue is still pending before the trial court.

Moreover, even if this Court were to deny this Petition, the federal issue presented may still be raised in the Illinois Supreme Court after a true final judgment has been entered. Indeed, this federal issue may even still be raised

in this Court upon entry of a final judgment—as that term is contemplated by Section 1257. *See Jefferson*, 522 U.S. at 83 ("Even if the Alabama Supreme Court adheres to its interlocutory ruling as 'law of the case,' that determination will in no way limit our ability to review the issue on final judgment."); *Thomas*, 532 U.S. at 780 ("Should the Supreme Court of Florida rule against the State on the *Chimel* issue, the question would be finally decided by the Florida courts, and the State could then seek certiorari in this Court.").

Finally, there is no federal policy at risk of serious erosion. A majority of the cases applying the fourth *Cox* exception involve First Amendment issues. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Cox Broadcasting, Inc. v. Cohn*, 420 U.S. 469 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Mills v. Alabama*, 384 U.S. 214 (1966).[7] Here, the issue presented is what remedy a State can provide for the imposition of a tax found to be unconstitutional under State law in a State court. This Court has repeatedly stated that these remedial issues are best left to the States to determine. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-77 (1984); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538-39 (1991). There is no federal policy at issue in this Petition.

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[7] Non-First Amendment cases applying the fourth *Cox* exception focus on the litigation resolution prong of the test. In those non-First Amendment cases, resolving of the federal question would terminate all remaining litigation. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 195, n.2 (1977); *Construction Laborers v. Curry*, 371 U.S. 542, 550 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963). Here, resolving of the issue that Petitioners seek for review will not terminate the litigation between the parties.

C. There Is No Cost Exception To The Finality Requirement.

Recognizing that jurisdiction is lacking, Petitioners try to create a new exception to the finality requirement. Their argument that they will be required to undergo costly discovery and trial to establish that they did not pass on the tax does not support the creation of a new exception and, in any event, has no evidentiary support in the record. Similarly, the requirement that Petitioners go through the normal litigation process to prove that they were actually damaged is not a reason to grant certiorari.

Throughout the Petition, Petitioners grouse that they will be required to establish their damages just like any other plaintiff in a civil case. (Petition at pp. 6, 8, 27, 28) Besides being a remarkable complaint for parties seeking tens of millions of dollars, Petitioners' hyperbole does not create an exception to the rule that only final judgments are reviewable under Section 1257.

In the context of administrative review, this Court has repeatedly recognized that an increase in burden and expense is not an exception to the requirement that administrative remedies must be exhausted before court involvement. *See Renegotiation Board v. Bannercraft Clothing Co. Inc.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (1938); *see also Miss America Org. v. Mattel, Inc.*, 945 F.2d 536, 545 (2nd Cir. 1991) ("Having to litigate an issue is not the sort of injury adequate to justify the application of the exception" to the exhaustion requirement.).[8] Similarly, the requirement that to go through the

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[8] Interestingly, one of the reasons for requiring litigants to exhaust their administrative remedies is so that a factual record can

(continued...)

normal litigation process to prove that they were actually damaged is not a reason to grant certiorari. The expense of litigation—particularly the expense to large insurance companies such as these—is not a basis for judicially re-writing Section 1257.

Furthermore, the Petitioners are simply wrong in their assertion that this process will necessarily be difficult and costly. First, unlike in the antitrust context, the Petitioners themselves have the information needed to determine how they set their own rates. As a result, their reliance on cases such as *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), is misplaced.[9] And even the presumptions in those cases are not persuasive because an analysis showing that on an industry-wide basis foreign insurers passed on the tax has already been done. 24 Ill. Reg. 16820 (November 13, 2000) (Interim Report of the Illinois Insurance Task Force, Analysis of the Pass Through of the Illinois Privilege Tax by Foreign Insurance Companies). Finally, the inclusion of taxes in the rates insurers charge is a fundamental precept of actuarial requirements for insurance rate-making, and those records are required to be

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[8] (...continued)
be developed. *See* Davis & Pierce, II Administrative Law Treatise, § 15.2 at 973-74. Here, on this interlocutory appeal, almost no factual record has been developed, in part due to Petitioners' repeated attempts to avoid discovery.

[9] Significantly, this Court has expressly limited *Hanover* and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the precedent Petitioners rely on, to cases arising under the federal antitrust laws. In *California v. ARC America Corp.*, 490 U.S. 93, 103 (1989), the Court stated: "As we made clear in *Illinois Brick*, the issue before the Court in both that case and in *Hanover Shoe* was strictly a question of statutory interpretation—what was the proper construction of §4 of the Clayton Act."

maintained.[10]

Tellingly, there are at least five insurance companies with over $17 million at stake in the proceedings below that have not joined in this Petition. These insurance companies have made the independent determination that there is no basis to seek this Court's review of the issue presented and obviously do not believe discovery and trial are unreasonably expensive.

* * *

The order sought to be reviewed is not final. It is an interlocutory order of an intermediate State court that remanded the matter for further proceedings. Moreover, because there will be further litigation in the Illinois courts and possibly this Court regardless of how this Court were to rule on the State-law issue presented, no exception to the finality requirement exists. Finally, Petitioners' attempt to mint a new exception to the finality requirement because

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[10] *See* Interpretive Opinion 3, *Professional Communications of Actuaries*, at (c)(4) (Actuarial Standards Board 1992) ("Records and other appropriate documentation of the actuary's work should be maintained by the actuary and retained for a reasonable period of time."); Actuarial Standard of Practice No. 9, *Documentation and Disclosure in Property and Casualty Insurance Ratemaking, Loss Reserving, and Valuations*, at Appendix 1, Paragraph I (Actuarial Standards Board 1991) ("Summary descriptions of . . costs are as follows: . . . . *Taxes, licenses and fees* are all taxes and miscellaneous fees except federal income taxes.") (emphasis in original); *id.* at Paragraph II ("Ratemaking should provide for all costs so that the insurance system is financially sound."); Actuarial Standard of Practice No. 29, *Expense Provisions in Property/Casualty Insurance Ratemaking*, Section 3.2 (Actuarial Standards Board 1991) ("The actuary should determine the provisions for . . . taxes, licenses, and fees that are appropriate for the policies to be written or coverages provided during the time the rates are expected to be in effect.").

of the normal costs of litigation is without precedent and should be rejected.

II. The Petition Should Be Denied Because There Is No Decisional Conflict For This Court To Resolve.

Generally, this Court grants petitions for writ of certiorari to resolve decisional conflicts. U.S. Sup.Ct.R. 10. But Petitioners have cited no decision of a State court of last resort or of a United States Court of Appeals that conflicts with the Illinois Appellate Court's ruling on the interlocutory issue presented. The two cases Petitioners do cite that address these issues after *McKesson* both required the claimant to prove it bore the burden of an unconstitutionally discriminatory tax to obtain a refund. (Petition at p. 17)[11]

In fact, the Illinois Appellate Court's decision is fully consistent with the decisions of other courts that have addressed the issue presented. After this Court's remand to determine remedial issues including possible refunds for an unconstitutional tax, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), the trial court addressed the same issue presented here in *James B. Beam v. State*, 437 S.E.2d 782 (Ga. 1993) (*Beam II*). Using nearly the identical analysis and relying on the same language of *McKesson* as the Illinois Appellate Court did here, the Georgia trial court specifically found that *McKesson* does not impose a *per se* prohibition on States from using their jurisprudence

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[11] *See South Cent. Bell Tel. Co. v. Alabama*, 789 So. 2d 147 (Ala. 2000) (requiring information on the extent to which taxpayers passed on to customers a discriminatory tax); *State ex rel. Paige v. Canady*, 189 W. Va. 650, 434 S.E.2d 10 (1993) (ruling that under *McKesson* State may require evidence that discriminatory tax was not passed on to customers).

against windfall to require a taxpayer to show that it did not pass the tax on before it can receive a refund:

> [E]ven the United States Supreme Court in *McKesson* seemed to indicate that if the facts establish a pass-on and the state law includes a comparable defense, no refund need be granted. 496 U.S. at 49, n. 34, 110 S.Ct. at 2257, n. 34, 110 L.Ed.2d at 43-44, n. 34 (1989). (Supp. App. 7)

In distinguishing *McKesson*, the Illinois Appellate Court stated the difference between Florida law, which was at issue in *McKesson,* and Illinois law:

> *McKesson* is distinguishable from the instant case. Unlike the defendant in *McKesson*, defendants here have cited an Illinois Supreme Court case that supports the use of a nonstatutory pass-on defense in a discriminatory tax case. *See Consolidated Distilled Products, Inc. v. Mahin*, 56 Ill.2d 110, 306 N.E.2d 465 (1973). (App. 13)

Petitioners have cited no case that conflicts with this specific reading of *McKesson*. Indeed, Petitioners seem to recognize that State courts uniformly read *McKesson* to allow them to apply a rule against windfall, if one exists under applicable State law. (Petition at pp. 10, 17)[12]

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[12] Petitioners misleadingly cite this Court's decision in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102 (1993), to support the statement that "[t]his court has consistently reaffirmed that *McKesson's* rejection of the pass-on defense in the context of a discriminatory tax is one of the 'minimum federal requirements' of Due Process." (Petition at p. 12) Nowhere in *Harper* did this Court say a single word about the pass-on defense. The Court's last word on the pass-on issue was *Beam*. There the Court confirmed that State procedural requirements for refunds, such as the require-

(continued...)

Petitioners assert that the Illinois Appellate Court's decision conflicts with *McKesson* itself. But that assertion is negated by this Court's decisions in *Bacchus* and *James Beam* as discussed below. In the absence of a clear decisional conflict, a petition for writ of certiorari should be denied. *See, e.g., Shalala v. Illinois Council on Longterm Care, Inc.*, 529 U.S. 1, 10 (2000) (certiorari granted to resolve conflict); *Alexander v. Sandoval*, 532 U.S. 275, 317 (Stevens, J., dissenting) (2001) (due to lack of conflict Supreme Court should not have taken case to review).

III. The Petition Should Be Denied Because The Illinois Appellate Court's Decision On This Interlocutory Issue Is Correct.

Read together, *Bacchus*, *McKesson*, and *Beam* stand for the unsurprising proposition that in determining the remedy for an unconstitutional tax, States can consider established State law preventing a party that did not bear the burden of the tax from receiving a windfall. Due Process does not require unjust enrichment.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276-77 (1984), Hawaii argued that distributors of liquor produced out of State were not entitled to a refund of the unconstitutional liquor tax because they passed the tax on to their customers. This Court recognized that such an argument was valid under its precedent. *Id.* (citing *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386 (1935)). But because no factual record had been developed on whether a refund would result in a windfall to the distributors, this Court

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(...continued)
ment that a taxpayer establish it bore the burden of an illegal tax may be enforced. *Beam*, 501 U.S. at 544.

remanded to the State court to address that and other remedial issues. *Bacchus*, 468 U.S. at 276-77.

In *McKesson Corp. v. Florida Alcoholic Beverages & Tobacco Div.*, 496 U.S. 18 (1990), this Court similarly found that liquor taxes that exempted liquor domestically manufactured were unconstitutional. In doing so, this Court addressed two aspects of the windfall concept. First, it found windfall to be inapplicable in the context of whether the ruling would be applied retroactively only. Second, it found that consistent with Due Process windfall may be applicable under State law so long as the State law actually recognizes the concept. *McKesson*, 496 U.S. at 49, n.34. This Court's decision in *McKesson* is also important in what it did not say. The *McKesson* decision did not overrule, criticize or even question its decision in *Bacchus*, which remanded to the State court to determine if a refund would result in a windfall. *See Shalala*, 529 U.S. at 18 ("[t]his Court does not normally overturn, or so dramatically limit, earlier authority *sub silentio*").

Just one year after *McKesson*, in *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), this Court followed its decision in *Bacchus* and explained that *McKesson* did not prohibit States from applying their established jurisprudence against windfall. Just as in *Bacchus* and *McKesson*, at issue in *Beam* was the constitutionality of a State's more preferential tax treatment of in-State liquor. In *Beam*, this Court—as it did in *Bacchus*—remanded to the State court to determine whether a refund of the taxes would result in a windfall. *Beam*, 501 U.S. at 538-39 (citing *Bacchus*, 468 U.S. at 276-77). This Court then explained that *McKesson* did not prevent such a result:

> Nothing we say here deprives [the state] of [its] opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to con-

> sideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal. 501 U.S. at 544.

Significantly, following the remand in *Beam II*, the Georgia courts and this Court understood this to be the proper analysis of *McKesson*. The trial court specifically found that *McKesson* allowed the State to apply its existing State law to determine if a pass-on in fact occurred. (Supp. App. 7). The Georgia Supreme Court affirmed, holding that the plaintiffs could not obtain refunds of taxes that they passed on. *Beam II*, 437 S.E.2d at 784.

After the Georgia Supreme Court denied the refunds, the *Beam II* plaintiffs filed a petition for writ of certiorari in the United States Supreme Court, making the identical arguments made by Petitioners now. This Court denied the petition for writ of certiorari and the petition for rehearing following the denial of the writ. *James B. Beam Distilling Co. v. Georgia*, 513 U.S. 1056 (1994), and 513 U.S. 1185 (1995). Similarly, the Petition for writ of certiorari should be denied here.

CONCLUSION

There are no compelling reasons to grant the Petition for writ of certiorari. No final judgment exists. And the issue falls within no recognized exception to the finality requirement. The Petitioners' only assertion why this Court should review the issue now is to allow them to escape what nearly all other civil plaintiffs undergo: discovery and the requirement that they prove damages. No such exception exists to the finality requirement, nor should one be created. The Illinois Appellate Court's interlocutory order was not novel and correctly followed this Court's holdings in *Bacchus*, *McKesson*, and *James B. Beam*. The Petition for writ of certiorari should be denied.

Respectfully submitted,

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